Supreme Court, U.S.
FILED
MAY 15 2007
OFFICE OF THE CLERK

No. 07-213

In The

Supreme Court of the United States

RAYMUNDO ALVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether, under *de novo* review, as opposed to the plain error review undertaken in *United States v. Cotton*, 535 U.S. 625 (2002), the Fifth Amendment prohibits sentencing a defendant under 21 U.S.C. § 841(b) based on a drug type and quantity that was not found by the grand jury.

2. Whether provisions of the "safety valve" statute, 18 U.S.C. § 3553(f), should be severed under the reasoning in *United States v. Booker*, 543 U.S. 220 (2005) because they contain critical cross-references to the United States Sentencing Guidelines.

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OPINION BELOW

The court of appeals issued an unpublished opinion, which is included in the Appendix and can be found at 2007 WL 528527 (9th Cir. Feb. 15, 2007).

JURISDICTION

The opinion of the court of appeals was filed on February 15, 2007. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

2. 18 U.S.C. § 3553(f) provides:

> Notwithstanding any other provision of law, in the case of an offense under [21 U.S.C. § 841], the court shall impose a sentence pursuant to the guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that –
>
> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or a supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

STATEMENT OF THE CASE

A federal grand jury in the Central District of California returned an indictment charging petitioner with distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1).[1] The indictment alleged: "On or about August

[1] The district court asserted jurisdiction pursuant to 18 U.S.C. § 3231.

17, 1999, in Riverside County, within the Central District of California, defendant RAYMUNDO ALVAREZ knowingly and intentionally distributed approximately 205 grams of methamphetamine, a schedule II controlled substance." The indictment simply alleged a violation of 21 U.S.C. § 841(a)(1) and did not allege any specific penalty provisions contained in section 841(b). The indictment did not specify whether the 205 grams was "pure" methamphetamine or instead was a mixture or substance containing a detectable amount of methamphetamine. The government filed an information pursuant to 21 U.S.C. § 851 alleging that petitioner had sustained a prior felony drug conviction. Like the indictment, the information did not allege any specific penalty provisions contained in section 841(b). Petitioner entered a guilty plea to the indictment without a plea agreement.

At sentencing, the government contended that petitioner was subject to a 20-year mandatory minimum sentence pursuant to 21 U.S.C. § 841(b)(1)(A) because he distributed more than 50 grams of pure methamphetamine and had a prior felony drug conviction. For a variety of reasons, petitioner disputed that he was subject to a mandatory minimum sentence of 20 years. Among other things, petitioner contended that the indictment did not specify that he distributed more than 50 grams of *pure* methamphetamine and that the mandatory minimum sentence was inapplicable because he was entitled to "safety valve" relief under 18 U.S.C. § 3553(f). The district court rejected petitioner's challenge to the indictment and found that it could not apply the safety valve provision because petitioner had more than 1 criminal history point

under the Sentencing Guidelines. *See* 18 U.S.C. § 3553(f)(1).[2] As a result, the district court imposed a mandatory minimum sentence of 20 years and a mandatory minimum term of supervised release of 10 years.

The Ninth Circuit affirmed. With respect to petitioner's indictment challenge, the Ninth Circuit held: "Alvarez's indictment expressly alleged that his offense involved 'approximately 205 grams of methamphetamine.' That was sufficient to put him on notice that he was subject to the sentencing enhancement provision of 21 U.S.C. § 841(b)(1)(A)(viii), which imposes a mandatory minimum when a defendant's conduct involves '50 grams or more of methamphetamine.'" With respect to petitioner's contention regarding "safety valve" relief, the Ninth Circuit held: "Alvarez contends that *United States v. Booker*, 543 U.S. 220 (2005), enabled the district court to apply the 'safety valve' provision of 18 U.S.C. § 3553(f) to circumvent the mandatory minimum. However, we recently rejected this precise claim. *See United States v. Hernandez-Castro*, 473 F.3d 1004, 1005-06 (9th Cir. 2007) (holding that '*Booker* left intact the requirement of § 3553(f)(1) that a defendant 'not have more than one criminal history point' and that 'courts have no authority to adjust criminal history points for the purpose of granting safety valve relief'). Thus, the district court properly concluded that Alvarez was ineligible for safety valve relief."

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[2] The Presentence Report also determined that petitioner was a leader or supervisor under the guidelines, which also precludes application of section 3553(f). *See* 18 U.S.C. § 3553(f)(4).

ARGUMENT

I. PETITIONER'S SENTENCE PURSUANT TO 21 U.S.C. § 841(b)(1)(A) VIOLATED THE FIFTH AMENDMENT BECAUSE THE GRAND JURY FAILED TO FIND A DRUG QUANTITY THAT WOULD TRIGGER THAT PROVISION AND THAT PROVISION WAS NOT ALLEGED IN THE INDICTMENT.

Section 841(b)(1)(A) sets a mandatory minimum sentence of 10 years if the offense of conviction involved "50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers." 21 U.S.C. § 841(b)(1)(A). That 10-year minimum sentence is increased to a 20-year minimum if the defendant has a prior felony drug conviction. *Id.* Section 841(b)(1)(B) sets a mandatory minimum sentence of 5 years if the offense of conviction involves "5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers." 21 U.S.C. § 841(b)(1)(B). That 5-year minimum sentence is increased to a 10-year minimum if the defendant has a prior felony drug conviction. *Id.* Section 841(b)(1)(C), which applies to any other offense involving methamphetamine, contains no mandatory minimum penalty and a 20-year statutory maximum. If a defendant has a prior felony drug conviction, that maximum is increased to 30 years. *See* 21 U.S.C. § 841(b)(1)(C).

In this case, the indictment alleged that 205 grams of methamphetamine were involved in the offense, but it did

not allege whether the offense involved 205 grams of pure methamphetamine or 205 grams of a mixture or substance containing methamphetamine. If the former, the mandatory minimum penalty would be 10 years, 20 years with a prior conviction. If the latter, the mandatory minimum penalty would only be 5 years, 10 years with a prior conviction. Moreover, the indictment only alleged a violation of 21 U.S.C. § 841(a)(1) and did not specify or cite which penalty provision in section 841(b) was applicable. Similarly, the information alleging a prior drug conviction, which doubled the applicable mandatory minimum penalty, did not specify or cite a penalty provision in section 841(b).

The indictment was returned in 1999. At that time, the Ninth Circuit and all other courts in the country considered drug type and quantity under section 841 to be "sentencing factors" that did not need to be found by the grand jury or proven at trial. *See United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002) (*en banc*) (collecting cases establishing old law). Subsequently, the Court has clarified that drug type and quantity must be found by the grand jury and alleged in the indictment. *See United States v. Cotton*, 535 U.S. 625 (2002).

Although the indictment in this case alleged that the offense involved 205 grams of methamphetamine, it is likely that the grand jury never made such a finding given that the indictment was returned in 1999. In other words, the likelihood is that, given the state of the law at the time of the indictment, the quantity of methamphetamine was simply inserted into the indictment by the prosecution. Furthermore, even if the grand jury made a finding concerning drug quantity, the indictment did not specify whether the grand jury found that the offense involved

205 grams of pure methamphetamine, thereby triggering the penalties contained in section 841(b)(1)(A), or instead involved 205 grams of a mixture of methamphetamine, thereby triggering the less onerous penalties in section 841(b)(1)(B). The indictment failed to allege which provision of section 841(b) is applicable, adding to the ambiguity.

The grand jury's failure to make a sufficient finding concerning drug quantity implicates Fifth Amendment questions left open by the Court in *Cotton*, 535 U.S. 625. In *Cotton*, the defendants failed to object in the district court, and therefore review was for plain error. The Court held that sentencing a defendant under section 841(b)(1)(A) when the grand jury failed to make a finding concerning drug quantity constituted plain error. Reversal was not required, however, because the plain error did not affect the fairness or integrity of the proceedings, which is required for reversal under the fourth prong of the plain error test.

In this case, petitioner objected to the application of section 841(b)(1)(A) in the district court, and therefore plain error review does not apply. Thus, this case presents the unresolved question of whether, under *de novo* review, reversal is required when the grand jury fails to make sufficient findings to trigger section 841(b)(1)(A). Petitioner contends that the insufficiency of the indictment requires reversal of his sentence under *de novo* review, as the indictment's insufficiency is not subject to any type of harmless error analysis.[3]

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[3] The Court recently declined to resolve this issue in *United States v. Resendiz-Ponce*, 127 S. Ct. 782 (2007).

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. Const. Amend. V. The Court has held that the insufficiency of an indictment requires reversal because "[t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Russell v. United States*, 369 U.S. 749, 770 (1962); *accord Stirone v. United States*, 361 U.S. 212, 217 (1960). The Court refuses to make such a "guess" because the grand jury possesses broad discretion to charge a lesser offense, fewer offenses, or no offenses at all pursuant to its screening function. *See Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986). The discretion identified in *Russell*, *Stirone*, and *Vasquez* precludes reliable assessment of the effect of the government's failure to present all of the required findings to the grand jury. Therefore, the error is structural and not subject to a harmless error analysis. *See United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 n.4 (2006) ("rest[ing its] conclusion of structural error on the difficulty of assessing the effect of the error") (citations omitted).

In other words, even if the facts established at the guilty plea and sentencing demonstrate that petitioner's offense involved over 50 grams of pure methamphetamine, thereby triggering the penalty provisions in subsection 841(b)(1)(A), such facts cannot cure insufficient grand jury findings under *Russell*, *Stirone*, and *Vasquez*. While such facts may avoid reversal under the fourth prong of the plain error test, they cannot circumvent reversal under *de novo* review.

Finally, the Ninth Circuit rejected petitioner's claim, reasoning that the indictment provided adequate "notice" to petitioner that he may be subjected to the penalties under section 841(b)(1)(A). Even assuming that this were true (and it is not, as the indictment did not clarify the purity of methamphetamine), "notice" is not the only issue. The question is what did the grand jurors *find*. The Fifth Amendment is not satisfied when a federal prosecutor simply inserts allegations (not found by the grand jury) into an indictment. While such inserted allegations may provide "notice" to the defendant, they deprive the defendant of his Fifth Amendment right to have the grand jury find and determine the appropriate offense to be charged. In this case, given that the indictment was returned in 1999, it is quite likely that the grand jurors were never instructed that they had to determine the quantity and purity of the methamphetamine involved. In sum, the Court should grant the instant petition to consider this important question, a question left unresolved in *Cotton* and *Resendiz-Ponce*.

II. CERTAIN PROVISIONS OF THE SAFETY VALVE STATUTE, 18 U.S.C. § 3553(f), SHOULD BE SEVERED UNDER THE REASONING IN *BOOKER* BECAUSE THEY CONTAIN CRITICAL CROSS-REFERENCES TO THE SENTENCING GUIDELINES.

As mentioned above, section 841(b)(1)(A) sets a mandatory minimum sentence of 10 years for offenses involving a requisite amount of methamphetamine, and that 10-year minimum sentence is increased to a 20-year minimum if the defendant has a prior felony drug conviction. Congress, however, has enacted a "safety valve"

provision in section 3553(f), which allows a court to pierce a mandatory minimum under the specified circumstances. In this case, the district court found that it could not apply the safety valve provision because petitioner had more than 1 criminal history point under the sentencing guidelines. *See* 18 U.S.C. § 3553(f)(1).

Petitioner contends that certain portions of section 3553(f), including section 3553(f)(1) and the portion of section 3553(f)(4) that cross-references the sentencing guidelines, should be severed from the statute in light of *United States v. Booker*, 543 U.S. 220 (2005). In *Booker*, the Court held that section 3553(b)(1) rendered the Sentencing Guidelines unconstitutional and therefore needed to be severed from the statute. As a result, the sentencing guidelines are now only "advisory." Importantly, in *Booker*, the Court did not limit severability to those sentencing provisions that created a *constitutional* problem. Indeed, the Court severed provisions of 18 U.S.C. § 3742, *not* because they were unconstitutional but because they could not "function independently" and contained "critical cross-references" to the guidelines. *Booker*, 543 U.S. at 259-60.

The Second Circuit has held that the Court's rationale requires that other provisions in section 3553, which were not before the Court in *Booker*, must also be severed. *See United States v. Selioustsky*, 409 F.3d 114, 116-17 (2d Cir. 2005) (severing out section 3553(b)(2)). Furthermore, with respect to section 3553(f), the Second Circuit has severed out the introductory portion of the subsection, which requires imposition of a guideline sentence after a court has determined that a defendant is entitled to safety valve relief. *See United States v. Castillo*, 460 F.3d 337, 353-54 (2d Cir. 2006). The Second Circuit, however, has not severed out the other portions of section 3553(f), such as

section 3553(f)(1), which rely on the sentencing guidelines. *See United States v. Barrero*, 425 F.3d 154, 156-58 (2d Cir. 2005). Other circuits, including the Ninth Circuit, *see Hernandez-Castro*, 473 F.3d at 1006-07, have agreed with the Second Circuit. *See, e.g.*, *United States v. McKoy*, 452 F.3d 234, 239-40 (3d Cir. 2006); *United States v. Brehm*, 442 F.3d 1291, 1300 (11th Cir. 2006); *United States v. Payton*, 405 F.3d 1168, 1173 (10th Cir. 2005).

Petitioner contends that the lower courts have erred in considering *Booker*'s severability analysis. These courts have reasoned that there is no constitutional problem with section 3553(f)(1), and therefore it need not be severed. *See, e.g.*, *Hernandez-Castro*, 473 F.3d at 1007; *McCoy*, 452 F.3d at 239-40. This reasoning misunderstands the severability analysis in *Booker*. As mentioned previously, in *Booker*, 543 U.S. at 259-60, the Court did not limit severability to those sentencing provisions that created a *constitutional* problem. The Court severed provisions of 18 U.S.C. § 3742, *not* because they were unconstitutional but because they could not "function independently" and contained "critical cross-references" to the guidelines. *Booker*, 543 U.S. at 259-60. In other words, a proper severability analysis does not simply involve consideration of whether a provision is constitutional but also requires an inquiry into whether the provision can properly function as it was intended given the severance of other interlocking provisions.

In this case, sections 3553(f)(1) and (f)(4) contain critical cross-references to the sentencing guidelines that prevent proper, independent functioning. Moreover, when Congress enacted sections 3553(f)(1) and (f)(4), it undoubtedly did so with the understanding that the sentencing guidelines were mandatory, not advisory. Given that the

sentencing guidelines are no longer mandatory, and given that sections 3553(f)(1) and (f)(4) contain "critical cross-references" to the guidelines, they cannot function properly as they were intended and therefore should be severed from the statute under *Booker*. If those provisions are severed from the statute, petitioner would be eligible for safety valve relief.

CONCLUSION

For the foregoing reasons, the Court should grant the instant petition for a writ of *certiorari*.

Respectfully submitted,

Dated: May 15, 2007

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2007 WL 528527

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAYMUNDO ALVAREZ, Defendant-Appellant.	No. 05-50806 D.C. No. CR-99-01093-RMT-01 MEMORANDUM* (Filed Feb. 15, 2007)

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Submitted February 13, 2007**
Pasadena, California

Before: PREGERSON, W. FLETCHER, and BERZON, Circuit Judges.

Defendant-Appellant Raymundo Alvarez appeals the district court's imposition of a 240-month sentence following his guilty plea to distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1). Alvarez advances four claims: first, that the allegations in the indictment were insufficient to trigger a mandatory minimum sentence;

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

second, that the plea colloquy did not adequately establish the drug quantity involved; third, that the district court wrongly concluded that Alvarez was ineligible for "safety valve" relief from the mandatory minimum; and fourth, that the fact of Alvarez's prior conviction should have been included the indictment and proven beyond a reasonable doubt.

Alvarez's indictment expressly alleged that his offense involved "approximately 205 grams of methamphetamine." That was sufficient to put him on notice that he was subject to the sentencing enhancement provision of 21 U.S.C. § 841(b)(1)(A)(viii), which imposes a mandatory minimum when a defendant's conduct involves "50 grams or more of methamphetamine." *See United States v. Buckland*, 289 F.3d 558, 568 (9th Cir. 2002) (en banc) (holding that "drug quantity and type . . . must be charged in the indictment"); *see also United States v. Valensia*, 299 F.3d 1068, 1070 (9th Cir. 2002) (holding that an indictment containing no drug quantity allegation was insufficient for sentencing enhancement purposes).

During Alvarez's plea colloquy, the prosecutor stated as part of the factual basis for the offense that Alvarez "possessed 209.5 grams of 98 percent pure methamphetamine which he intended to sell" and that Alvarez "told the buyers that he possessed a half pound of methamphetamine." Alvarez confirmed that this information was accurate. His case is therefore unlike *United States v. Thomas*, 355 F.3d 1191 (9th Cir. 2004), in which the defendant denied the drug quantity allegation during the plea colloquy. Also, both the indictment and plea colloquy were sufficient to establish that Alvarez's offense involved "methamphetamine," rather than a "mixture or substance containing a detectable amount of methamphetamine." *See*

United States v. Asuncion, 973 F.3d 769, 773 (9th Cir. 1992); *United States v. Alfeche*, 942 F.2d 697, 698 (9th Cir. 1991).

Alvarez contends that *United States v. Booker*, 543 U.S. 220 (2005), enabled the district court to apply the "safety valve" provision of 18 U.S.C. § 3553(f) to circumvent the mandatory minimum. However, we recently rejected this precise claim. *See United States v. Hernandez-Castro*, 473 F.3d 1004, 1005-06 (9th Cir. 2007) (holding that "*Booker* left intact the requirement of § 3553(f)(1) that a defendant 'not have more than one criminal history point'" and that "courts have no authority to adjust criminal history points for the purpose of granting safety valve relief"). Thus, the district court properly concluded that Alvarez was ineligible for safety valve relief.

Alvarez's argument that 21 U.S.C. § 851 is unconstitutional because it does not require the fact of a prior conviction to be alleged in the indictment and proven beyond a reasonable doubt is also unavailing. We have made clear that we continue to apply *United States v. Almendarez-Torres*, 523 U.S. 224 (1998), which rejected these requirements. *See, e.g., United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006) (noting that *Almendarez-Torres* governs even when a defendant does not admit his prior conviction).

Accordingly, we affirm Alvarez's sentence. The government's motion to expand the record is denied as moot.

AFFIRMED.